

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 21, 2006 Session

**INDUSTRIAL PRODUCTS GROUP, INC., ET AL. v. AZTECH
INDUSTRIAL SUPPLY, INC., ET AL.**

**Appeal from the Circuit Court for Davidson County
No. 02C-1996 Thomas W. Brothers, Judge**

No. M2005-00403-COA-R3-CV - Filed on June 27, 2006

The trial court summarily dismissed the plaintiffs' legal malpractice action against the law firm after finding no violations of the standard of care, that no causal link existed between the alleged negligent acts and omissions of the law firm and the harm suffered, and the action was barred by the statute of limitations. Finding no genuine dispute of material facts exists and the law firm is entitled to summary judgment as a matter of law, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Raymond G. Prince, Nashville, Tennessee, for the appellants, Aztech Industrial Supply, Inc., Philip Kelly, and Lesly Hart-Kelly.

Douglas Fisher, Nashville, Tennessee, for the appellee, Baker Donelson Bearman & Caldwell.

OPINION

Aztech Industrial Supply, Inc. is an electrical supply business in Wilson County, Tennessee. Its shareholders, Philip Kelly and Lesly Hart-Kelly, desired to wind down their business affairs and solicited offers to purchase Aztech or its assets. An associate of the Kellys put them in contact with Industrial Products Group, Inc. (hereinafter IPG) in the hopes that IPG would purchase Aztech or its assets.

The parties entered into negotiations. At the outset of the negotiations, IPG was represented by an attorney in Atlanta, Timothy Boyd, and Aztech was represented by Kenneth P. Ezell of the law

firm of Baker, Donelson, Bearman, and Caldwell (hereinafter Baker Donelson).¹ Prior to signing a letter of intent, IPG's attorney, Timothy Boyd, joined the Chattanooga office of the law firm of Baker Donelson, which created a conflict of interest for Boyd, Ezell, and Baker Donelson.

When Boyd joined Baker Donelson, he and Ezell notified their respective clients of the conflict of interest. Boyd and Ezell each recommended the client obtain new counsel. Nevertheless, the Kellys on behalf of Aztech, and Jim Fair, Daryl Wilkes, and Trevor Finger on behalf of IPG, insisted Boyd and Ezell continue to represent them and agreed to waive any conflict of interest. The clients and the lawyers signed the appropriate waivers, and Boyd, Ezell, and Baker Donelson established a screening mechanism, an ethical wall so-to-speak, to protect their respective clients' confidential information.² Thereafter, the parties proceeded with the same counsel as before.

The parties signed a letter of intent on June 4, 2001,³ which outlined the general terms under which IPG proposed to acquire the assets of Aztech. The letter of intent represented the parties' understanding in principle until a definitive purchase agreement was executed. It contemplated the purchase by IPG of certain assets of Aztech, those identified and described, and the exclusion of others. Assets specifically excluded from the transaction were cash on hand or deposit, inventory more than twelve months old, accounts receivable more than 90 days old, and customer consigned inventory.

The purchase price, which was approximated in the letter of intent, was to be determined later, near the time of closing. It was to be the sum of the following: (a) \$59,000; (b) the net book value of all inventory included in the transaction; and (c) the value of all accounts receivable included in the transaction.⁴ Subject to credits and debits for additions and dispositions, it was anticipated the purchase price would be approximately \$418,696, based upon the March 31, 2000 balance sheet. The purchase price was payable as follows: a cash payment of \$59,000 at closing, with the balance owing paid by a promissory note secured by an irrevocable, unconditional letter of credit in an amount equal to the note plus interest.

¹Prior to the execution of the letter of intent, most of the negotiating was done by the parties without the direct involvement of counsel.

²An ethical wall is a screening mechanism that protects a client from a conflict of interest by preventing one or more lawyers within the firm from participating in matters involving that client. The mechanism is designed to allow a lawyer to move to a new job without the fear of vicariously disqualifying the new employer from representing certain clients. The ethical wall generally entails prohibiting certain lawyers and others from having any connection with the matter; banning discussions with or the transfer of documents to those individuals; restricting access to files; and educating members of the firm about the separation of the lawyers and others from the pending matter. *See* definition of "Ethical Wall" in Black's Law Dictionary (8th ed. 2004).

³Boyd joined Baker Donelson on July 5, 2001.

⁴IPG was to receive a credit against the purchase price equal to all accounts payable assumed by IPG.

The letter of intent further provided that the parties would enter into good-faith negotiations toward the execution and delivery of a definitive purchase agreement. The letter of intent called for a closing on or around June 30, 2001. The parties subsequently agreed to a July 18, 2001 closing.

When the parties arrived at the closing on July 18, they had not agreed on a final purchase price or executed the purchase agreement. This was due in part to the fact the Kellys had not provided a complete and current list of Aztech's assets. Trevor Finger, president of IPG, presented a promissory note and a bank letter of credit at the closing made out to Aztech in the amount of \$260,000. The Kellys, however, informed IPG at the closing that Aztech had recently acquired additional assets, that the purchase price would need to be increased and, thus, the promissory note and letter of credit would need to be increased. The Kellys also wanted the letter of credit made out to them individually, not to Aztech.

Finger, on behalf of IPG, agreed to obtain a new letter of credit payable to the Kellys, instead of Aztech, and in the correct amount; however, he advised the Kellys doing so would take additional time.⁵ Instead of delaying the closing, Finger requested they proceed with the closing and assured the Kellys the letter of credit would be forthcoming. The Kellys agreed to complete the closing without the letter of credit. As a consequence, the parties proceeded to sign and exchange all available closing documents. The purchase note was not provided to the Kellys at the closing because it was dependent upon the final purchase price, which was not available. The letter of credit was not provided because it, too, was dependent on the purchase price, and it needed to be re-issued as requested by the Kellys.

Subsequent to the closing, the Kellys provided IPG with an updated list of assets and inventory, along with the purchase price Aztech paid for each item of inventory; however, contrary to the parties' agreement, the list did not include the date on which each item of inventory was purchased. The date the inventory was purchased was relevant to the purchase price due to the provision that excluded inventory that was more than twelve months old.

In October of 2001, after being "hounded" by the Kellys, Finger provided the Kellys with a guaranty from IPG and a purchase note in the requested amount. The new or corrected letter of credit, however, was not provided. Shortly thereafter, differences arose among the parties and a variety of problems associated with the purchase of Aztech's assets came to light.

Among the assets IPG purchased from Aztech was a computer, which had the capability of providing itemized lists of Aztech's inventory and the purchase dates for each item of inventory. When IPG utilized the new computer it had acquired from Aztech it discovered Aztech and the Kellys had the purchase dates for the inventory readily available to them prior to closing. Based upon this discovery, Finger believed the Kellys intentionally concealed or misrepresented the age

⁵The additional time was required for two reasons. One, the inventory had not been updated and, thus, the purchase price had not been established. Two, once the purchase price was established, Finger needed a couple of days to obtain the new letter of credit from the bank.

of the Aztech inventory. Based upon his calculations, he estimated that Aztech had overcharged IPG approximately \$190,000 for out-dated inventory. As a consequence, IPG ceased making payments for the purchase of the assets. When the payments stopped, the Kellys went to the bank to collect on the letter of credit,⁶ only to discover IPG had instructed the bank to cancel the letter of credit.⁷

This action commenced when IPG filed a Complaint against Aztech, the Kellys, and Baker Donelson on August 30, 2002, claiming the Kellys had fraudulently induced them into buying worthless electrical equipment and that Baker Donelson had committed legal malpractice. Aztech answered and countersued for the unpaid balance of the purchase price on October 7, 2002. More than a year later, on October 16, 2003, Aztech filed a cross-claim against Baker Donelson. It is the cross-claim by Aztech that is the subject of this appeal.⁸

The parties filed competing Motions for Summary Judgment. The trial court granted Baker Donelson's Motion for Summary Judgment and dismissed all of Aztech's and the Kellys' claims from which judgment Aztech and the Kellys appeal.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when

⁶The Kellys still had not received the letter of credit that had been promised at the closing.

⁷Wilkes and Fair of IPG instructed the bank to cancel the rejected letter of credit on May 22, 2002.

⁸The issues raised in IPG's Complaint above been compromised and settled and/or disposed of on summary judgment for which an appeal was not taken. Thus, the issues on appeal are limited to The Kellys' and Aztech's claims of professional malpractice against Baker Donelson.

the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

In a legal malpractice action, the client has a period of one year from the date the cause of action accrues within which to file a claim for legal malpractice. Tenn. Code Ann. § 28-3-104(a)(2). Furthermore, the client is required to “prove that the attorney's conduct fell below that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction . . . [and] demonstrate a nexus between the negligence and the injury.” *Hill v. Moncier*, 122 S.W.3d 787, 790 (Tenn. Ct. App. 2003) (quoting *Sanjines v. Ortwein & Assocs., P.C.*, 984 S.W.2d 907, 910 (Tenn. 1998) (citations omitted in original)).

Statute of Limitations

Although the complaint sets forth a comprehensive set of facts and assertions against Baker Donelson, the matters at issue pertain to the fact the Kellys did not receive a letter of credit to secure payment of the balance of the purchase price. The Kellys contend this was due to professional errors or omissions by Baker Donelson at the closing and subsequent to the closing. The Kellys also contend this action was timely commenced because they were unaware they had sustained a compensable injury until October 16, 2001, at the earliest. We, however, find the genuine, material facts to be undisputed, and they support but one conclusion, that being the Kellys forfeited the contractual right to compel IPG to provide a letter of credit on July 18, 2001, when they executed and delivered to IPG the bill of sale of the assets without obtaining an irrevocable, unconditional letter of credit from a bank. Since the Kellys did not commence their action against Baker Donelson until October 16, 2003, Baker Donelson is entitled to summary judgment as a matter of law.⁹

Legal malpractice actions, whether grounded in contract or tort, “must be commenced within one year after the cause of action's accrual.” *Cherry*, 36 S.W.3d at 83 (citing Tenn. Code Ann. § 28-3-104(a)(2)). The Kellys did not commence their action against Baker Donelson for almost twenty-seven months from the date of closing. If the cause of action accrued on the date of closing,

⁹As we discuss later, the parties executed a one-year tolling agreement on July 11, 2002; however, even with the additional time, the action is time barred.

July 18, 2001, it is clearly time barred. The Kellys contend their cause of action did not accrue until much later, October 16, 2001 at the earliest, and with the additional twelve months they were awarded due to the parties signing a tolling agreement, the action was timely commenced. Thus, we must ascertain when this cause of action accrued.

To determine when the cause of action accrued, we look to the point in time when “the client suffers a legally cognizable injury resulting from an attorney's negligence or other wrongdoing, and the client knows or should know the facts sufficient to give notice of that injury.” *Cherry*, 36 S.W.3d at 83 (citing *John Kohl & Co., P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn.1998))(other citations omitted). Plaintiffs are deemed to have discovered the right of action if they are aware of “facts sufficient to put a reasonable person on notice that [they have] suffered an injury as a result of wrongful conduct.” *Hill*, 122 S.W.3d at 791 (quoting *Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn.1995)) (other citations omitted in original). This is known as the discovery rule. A legal malpractice cause of action accrues when “(1) the client suffers an actual or legally cognizable injury, and (2) the client knows, or in the exercise of reasonable diligence should know, that the injury was caused by the attorney's negligence.” *Hill*, 122 S.W.3d at 790-91 (quoting *Carvell*, 900 S.W.2d at 28-30. It is not necessary that the plaintiff “actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a ‘right of action’; the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.” *Carvell*, 900 S.W.2d at 29 (quoting *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994)). “A plaintiff cannot be permitted to wait until he knows all of the injurious effects or consequences of an actionable wrong.” *Carvell*, 900 S.W.2d at 27 (quoting *Sec. Bank & Trust Co. v. Fabricating, Inc.*, 673 S.W.2d 860, 864-65 (Tenn. 1983)).

The Asset Purchase Agreement required, as a condition precedent to closing, that IPG provide an irrevocable, unconditional letter of credit from a bank to secure the payment of the purchase price. By contract the Kellys were under no obligation to sell the assets of Aztech unless and until IPG provided a sufficient letter of credit. Nevertheless, the Kellys voluntarily conveyed the assets to IPG on July 18, 2001, without the financial guarantee afforded by an irrevocable, unconditional letter of credit. By doing so, the Kellys exposed themselves to the financial risk of IPG refusing to pay or not being financially able to pay the balance of the purchase price of the assets. Just as significant, the Kellys were aware of this risk on July 18, 2001. As Mrs. Kelly testified, “I was concerned, yes, sir.”

The Kellys erroneously contend their cause of action was timely filed because it did not accrue until October 16, 2001, at the earliest. It was on this date IPG provided, belatedly, the corrected purchase note but without the letter of credit. The Asset Purchase Agreement required both the purchase note and a bank letter of credit to secure the obligation evidenced by the note. The Kellys claim this is when they were first aware of the injurious effect of not having the letter of credit. The fact IPG produced a letter of credit at the scheduled closing on July 18, 2001, that was unacceptable to the Kellys is of no consequence. The fact IPG and Finger assured the Kellys IPG would provide a corrected letter of credit as soon as possible after the closing is of no consequence.

The fact the parties had yet to agree on the final purchase price of the assets when the Kellys delivered the documents to sell the assets to IPG is likewise of no consequence. The only facts material to the issue of the accrual of the Kellys' cause of action against Baker Donelson are that on July 18, 2001, the Kellys signed and delivered to IPG documents selling the assets of Aztech to IPG and left without having in hand an irrevocable, unconditional letter of credit from a bank payable in the correct amount. The effect of not having an irrevocable, unconditional letter of credit from a bank would have been obvious and more than sufficient to put a reasonable person on notice on July 18, 2001, that he or she may not be able to collect the balance of the purchase price. Although the parties executed a twelve-month tolling agreement on July 11, 2002, it is insufficient to save the Kellys from the effects of Tenn. Code Ann. § 28-3-104(a)(2).

Therefore, the Kellys' legal malpractice action against Baker Donelson, which was filed two years and three months after the closing, is time-barred for which summary dismissal is proper.

Standard of Care and Causation

The Kellys contend Baker Donelson had a professional duty to require IPG to produce the letter of credit and that Baker Donelson breached that duty by failing to obtain the letter of credit. They also contend the trial court erred by summarily dismissing their claim because reasonable minds could differ as to whether or not Baker Donelson's acts and omissions fell below the appropriate standard of care. We find no error with the trial court's decision to grant summary judgment.

Assuming this action was timely commenced, to prevail the Kellys would have to prove that Baker Donelson's conduct fell below that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction, and they would have to demonstrate a nexus between the negligence and the injury. *Hill*, 122 S.W.3d at 790; *Sanjines*, 984 S.W.2d at 910.

The Kellys were to provide information essential to facilitate a proper closing. This information included the final, updated inventory list and pricing information. The information was essential because it was needed to establish the final purchase price of the assets, without which neither IPG nor Baker Donelson could prepare and/or provide a letter of credit and/or the purchase note. Due to the Kellys' failure to provide the updated inventory list with itemized pricing information, the requisite closing documents were not available.

When the parties met at the closing and realized they lacked the current inventory information, a significant discussion ensued regarding the fact the purchase price of the assets could not be determined until the list was updated, and thus the letter of credit and purchase note could not be provided, as each was dependent on the purchase price. Moreover, Mrs. Kelly insisted the purchase price and the letter of credit be increased due to recent inventory purchases. Even though all necessary closing documents were not available, Finger urged the Kellys to go forward with the closing because several people had traveled great distances to attend the closing. Finger assured the

Kellys the letter of credit would be forthcoming. At Finger's insistence, and in spite of the fact the letter of credit and purchase note were not available for the closing, the Kellys accepted Finger's assurances and proceeded to sign the documents necessary to sell the assets to IPG, including the Bill of Sale and Asset Purchase Agreement.

The Kellys were fully aware at closing that all necessary closing documents were not available and would not be available for the closing; nevertheless, they proceeded with the closing knowing they would not have the benefit of the letter of credit and purchase note when they left the closing. The evidence in the record establishes without dispute that the Kellys' failure to provide the updated inventory information prevented Baker Donelson from providing all of the closing documents. The Kellys' failure to timely provide such information is the reason all of the necessary closing documents were not available. Thus the Kellys, not Baker Donelson, were responsible for the documents not being available at the closing.

The Kellys additionally contend Baker Donelson had the professional responsibility to provide the letter of credit post-closing. The contention, as asserted by the Kellys, carries with it the assumption that Baker Donelson had the independent ability to compel IPG and/or a bank to provide a fully executed letter of credit. We find the contention without merit.

The record clearly establishes that only IPG and its bank had the ability to provide the letter of credit and that Baker Donelson was powerless in that regard. Once the Kellys executed the documents selling Aztech's assets to IPG and left the closing without the letter of credit, Baker Donelson was powerless to provide the letter of credit or to cause IPG or the bank to do so.

We also find the Kellys' contentions to be disingenuous because of two significant admissions by the Kellys. Mrs. Kelly does not recall asking Mr. Ezell of Baker Donelson to do anything after the July 18 closing. Mr. Kelly testified that it was his understanding after the closing the parties themselves were going to work out the details, and he does not recall getting the lawyers involved in post-closing adjustments. Furthermore, Mr. Kelly conceded that in a conversation subsequent to the closing that he told Mr. Ezell he received the guaranty from IPG and thought he had received the letter of credit from IPG. Under the facts of this case, we find it problematic to fault Mr. Ezell for failing to do that which was not requested by his client or to obtain that which the client tells him he has received.¹⁰

The record fails to support the Kellys' contention, or to make out a dispute of fact to support the contention that Baker Donelson deviated from the professional standard of care leading up to or during the closing. Moreover, the record fails to support the Kellys' contention, or to make out a dispute of fact to support the contention that Baker Donelson was under a duty to provide the letter of credit post-closing. To the contrary, the record clearly establishes that Baker Donelson was powerless after closing to produce the letter of credit had it had the duty to do so.

¹⁰The Kellys received the note and guaranty from IPG in October 2001. Mr. Kelly subsequently advised Pete Ezell he had received the documents from IPG and he "thought" the letter of intent was included in them.

IN CONCLUSION

The judgment of the trial court is affirmed in all respects, and this matter is remanded with costs of appeal assessed against Appellants, Philip Kelly, Lesly-Hart Kelly and Aztech Industrial Supply, Inc.

FRANK G. CLEMENT, JR., JUDGE